Filed 6/5/19 P. v. Michel CA4/1
(unmodified opinion attached)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ANTHONY MICHEL, Defendant and Appellant.	D075390 ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT (Super. Ct. No. 16CR031964)

THE COURT:

It is ordered that the opinion filed herein on May 20, 2019, be modified as follows:

1. On page 25, in the second sentence in the second paragraph, change "involuntary" to "voluntary," so that the sentence reads:

> Under *Woods*, to hold that voluntary manslaughter instructions on a heat of passion theory were required, we would have to conclude that the jury could reasonably find not only that voluntary manslaughter was foreseeable but that second degree murder was not.

2. On page 28, delete the existing first full paragraph and replace it with the following:

> In closing argument, defense counsel argued that voluntary manslaughter was the "only verdict" that the jury could return

> because the prosecution had not proven "beyond a reasonable doubt that this isn't a voluntary manslaughter case." However, after two trials, zero out of 24 jurors voted for voluntary manslaughter. This is undoubtedly because the overwhelming evidence showed that Michel (1) challenged Albert to fight, (2) recruited an armed gang member, and (3) returned with the gunman and his cohorts to shoot Albert, who Adrianna had ordered to be killed.

3. At the end of the first full paragraph on page 28, after the sentence ending "ordered to be killed," add as footnote 9 the following footnote, which will require renumbering of all subsequent footnotes:

> We reject Michel's contention that the jury's questions during deliberations indicated that jurors did not find that Michel recruited an armed gang member to return to the Park to shoot Albert. In additional closing arguments, the prosecutor addressed these questions and explained that Michel "goes to a place where guns are kept, and it's the most notorious gang residence you can think of. . . . And most importantly . . . [J.M.] says that . . . [Michel] said, 'They have guns so let's go get some people who do have guns.'" The prosecutor further argued, "And most important, if [Michel] wants to go there to fight, he would go where the guys were waiting to fight. . . . [Ana] had no logical explanation why they drove to the other side of the [P]ark . . . . The guys had their shirts off and they were ready to fight when they first went to [the Park] . . . . Why not—if this is a fight—go right where the guys are with their shirts off."

There is no change in the judgment.

Appellant's petition for rehearing is denied.

NARES, Acting P. J.

Copies to: All parties

Filed 5/20/19 P. v. Michel CA4/1 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ANTHONY MICHEL, Defendant and Appellant.	D075390 (Super. Ct. No. 16CR031964)

APPEAL from a judgment of the Superior Court of San Bernardino County, Ingrid A. Uhler, Judge. Affirmed and remanded with directions.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel Anthony Michel appeals his jury-tried convictions for second degree murder of Albert P. (Pen. Code,[1] § 187, subd. (a); count 1) and participating in a criminal street gang (§ 186.22, subd. (a); count 2). The jury also found true certain firearm enhancements and that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The court sentenced Michel to prison for 40 years to life, which includes 25 years to life for a gun enhancement under section 12022.53, subdivisions (d) and (e).

Michel contends the judgment should be reversed because (1) trial counsel did not seek to exclude incriminating statements he made in police interrogations, which he claims were psychologically coerced; and (2) the court failed to instruct sua sponte on heat-of-passion voluntary manslaughter on a natural and probable consequences theory. We reject these contentions.

After the court sentenced Michel, but before the judgment was final, an amendment to section 12022.53, subdivision (h) became effective, giving the trial court discretion to strike or dismiss the 25-year-to-life gun enhancements. Michel contends, and the Attorney General concedes, that this amendment applies. Because the record contains no clear indication that the trial court will not exercise its discretion to reduce Michel's sentence, we will remand to allow the trial court to consider this issue.

Michel also contends, and the Attorney General agrees, that errors in the abstracts of judgment should be corrected. We will direct the trial court to make these corrections.

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1 Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's Case*

1. *Gang rivalry leading to the killing*

This case involves two rival gangs: Another Latin Crew (ALC) and Eastside Fontana (Eastside). In 2013 this rivalry turned deadly when an ALC member killed Eastside member Reyes P. In 2015 Eastside retaliated by killing Julio O., an ALC member.

Adrianna C. leads ALC. A gang expert testified that she is "an absolute terror on the city of Fontana and society due to her in-depth involvement in this gang." Adrianna's home serves as ALC headquarters. Although she is only 16 years old and it is uncommon for a young female to control a gang, Adrianna is not only "deeply involved into this gang," but is "brazen" and violent. Michel told police that Adrianna "is crazy" and should be kept in a "cage."

Julio was the father of Adrianna's sister's child. Adrianna believed that Albert, an Eastside member, was the getaway car driver in Julio's killing and ordered that he be killed. On June 27, 2016—nine days before Albert's killing—Adrianna unsuccessfully attempted to shoot Albert herself.

2. *Albert's killing*

Michel is an ALC gang member. Ana M. is the mother of Michel's child.[2] On July 5, 2016, Michel was a passenger in Ana's parked car on Reed Street when Albert

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2 Ana testified under a grant of immunity.

drove by alone in his car. Michel told Ana to follow Albert. When alongside Albert's car, Michel challenged him to fight. Albert told Michel to follow him; however, when Albert drove into Eastside territory, Ana and Michel returned to Reed Street.

After Ana parked and exited her car, Albert also returned to Reed Street, but this time with a passenger, Robert C., an Eastside member. Robert reached into his waistband, indicating he had a gun. Michel told Ana that Robert was armed. Albert told Michel to follow him to a public park (the Park) to fight. Both ALC and Eastside claim the Park as their exclusive territory.

Ana and Michel drove to the northeast side of the Park, where they saw Albert and Robert standing outside Albert's car, apparently ready to fight. Believing that Robert was armed, Michel told Ana to drive to Adrianna's house to get some ALC members with guns. There, Adrianna directed three gang members—Brandon G., Miguel G. and Javier M.—to get in Ana's car.

Brandon had a .45-caliber semiautomatic handgun, along with gloves and a bandana to cover the gun. Brandon told Michel they would have to shoot before Robert and Albert could fire first. Ana drove Brandon, Miguel, and Javier to the Park's *west* side, about 500 yards from where Albert and Robert were located. Before exiting Ana's car, Brandon chambered a round in the gun.

Ana and Michel drove to the Park's east side, where Albert and Robert were standing. Meanwhile, Brandon, Miguel and Javier were walking "like they were on a mission" towards the east side of the Park.

About a minute later, Brandon, Miguel and Javier ran after Albert and Robert, who tried to run away. They were all running at full speed. Albert and Robert had no weapon in their hands.[3]

Brandon shot Albert in the buttocks and in the arm. Robert escaped.

As Albert lay bleeding and begging for his life, Miguel kicked him in the face. One shot damaged Albert's femoral artery, killing him. Albert had a significant amount of methamphetamine in his system at the time of death.

Ana and Michel drove Brandon to Adrianna's house. Michel went to Miguel's house. There, Michel texted Ana, "The best knowing you got me like I got you" and "I swear you're the best."

Ana went to her best friend's (J.M.'s) house and told her what had happened. J.M. texted her boyfriend, "Crazy shit happened last night and her baby daddy and his crew killed someone and Ana was the getaway car."

A gang expert testified that because ALC and Eastside were in a heated rivalry, by fighting in the Park, a location both gangs claimed as their territory, it was reasonably foreseeable that a challenge to a fist fight could escalate to a shooting. He also testified that knowing one gang might have a gun, it would be "absolutely insane" for a rival gang member to show up without a firearm.

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3 Albert had a closed knife in his pants pocket.

B. *The Defense Case*

Ana testified that Michel did not want to fight Albert at the Park because it was two (Albert and Robert) against one—and it was her idea to get another person to fight alongside Michel. She testified that upon arriving at Adrianna's house, four men got in her car. Ana stated that she drove to the east side of the Park to see if Albert and Robert had moved there. She denied that the plan was to ambush Albert. Ana also denied any discussion about guns or shooting Albert. She denied telling her friend that Michel told her to drive to Adrianna's house to get people with guns. Ana also testified that Michel never told anyone to bring a gun and never said anything about shooting anyone. She claimed that at the Park, Michel was scared and unwilling to fight or even get out of her car.

Michel did not testify. In his police interrogation that was played for the jury, Michel denied knowing that anyone was armed. He stated that the plan was for him to fight Albert alone, and that Brandon, Miguel, and Javier were to wait to see if Michel got ambushed, and only then fight with him. Michel told police that after the shooting he and Ana left the Park and did not give Brandon a ride from the scene.

C. *Procedural History*

In Michel's first trial, the jury convicted him on count 2 (participating in a criminal street gang), but after the jury hung on count 1 (murder) the court declared a mistrial on that count.

In the second trial, the jury was also unable to reach a verdict on first degree murder. The People asked the court to dismiss the first degree murder charge under

section 1385 and have the jury continue deliberating on the remaining counts (second degree murder and voluntary manslaughter as lesser included offenses).[4] The court granted that motion, stating: "I think, potentially, [the jury is] having an issue emotionally, which I have obviously indicated they have to set that aside. But I think, emotionally, there's an issue because [Michel] is not the actual shooter. . . . He is young. There is an indication he never . . . 'got out of the car.' There's also an indication that the jurors are considering the fact that the getaway driver, his girlfriend, was not prosecuted and granted immunity."

The court informed the jury that "[f]irst degree murder no longer needs to be decided in this case" and "to continue your deliberations to determine whether or not the defendant is guilty of second degree murder, voluntary manslaughter, or not guilty." Thereafter, the jury found Michel guilty of second degree murder and found true the firearm and gang allegations.

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4 Section 1385, subdivision (a) provides in part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record."

I. *MICHEL'S STATEMENTS TO POLICE WERE NOT COERCED*

A. *Additional Background*

1. *Michel's first interrogation*

Police apprehended Michel the day after Albert was shot and, after waiving his *Miranda* rights,[5] Michel acknowledged that police were questioning him about a murder. Michel claimed that on the previous night he was awakened by a caller saying, "We, we just did something." Michel told police that he had nothing to do with Albert's killing, but had been told that Brandon shot Albert and that Miguel and Javier kicked Albert in the face. Michel claimed that he had already "distanced himself" from ALC and had never met Adrianna. He told police that he had no animosity towards Albert and his "heart ached" when he heard that Albert, a former friend of his, had been killed. Michel told police that Adrianna sent "those guys" to kill Albert to retaliate for Eastside's killing of Julio, who was Adrianna's sister's "baby daddy." Michel knew that Brandon shot Albert with a .45-caliber handgun. Michel insisted that he "wasn't involved," "wasn't there," and that he was "not scared" because he "didn't do anything."

2. *Police interview J.M.*

Meanwhile, other detectives interviewed J.M. The jury heard an audio tape of that interview. Ana told J.M. that Michel knew Robert had a gun. Michel told Ana, "[L]et's go get some people who do have guns," and they picked up armed ALC gang members. After being dropped off near the Park, the men chased Albert and shot him.

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5 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

3. *Police interview Ana*

The jury also watched a video of Ana's interrogation. In her first interview, Ana told police that Michel and Albert decided to fight at the Park and as she and Michel arrived there, "out of the nowhere" she saw four men walking, one of whom "pull[ed] something out." Ana told police that she saw Albert get shot, but she did not know the shooter's identity. Ana said that Michel told her to leave right away, so she drove Michel back to Reed Street where they stayed the night.

After the detective pointed out certain inconsistencies in Ana's story, she admitted picking up three people at Adrianna's house. Ana told police that she and Michel thought that Robert was armed, and she dropped the three off on the east side of the Park. After the shooting, she took one of the men back to Adrianna's house. Michel told her to return to the Park to get the others, but she did not want to return.

When the detective left the room, Ana and Michel spoke to each other through a common wall separating their interview rooms. Michel asked Ana, "They know?" Ana replied, "They know. [¶] . . . They know. They know. [Michel]. They know." Michel said, "They know, but they're not sure." Ana replied, "Yeah, they are."

4. *Michel's second interrogation*

After Ana's interview, police questioned Michel again, telling him that Ana admitted being at the Park with him during the shooting. Michel continued to deny this, and then the following discussion occurred:

"Officer: . . . Did you guys go by there [the Park], yes or no?

"Michel: The [P]ark? No.

"Officer: She's saying you guys did. She, she was driving the car. [¶] . . . And you went and picked up these fools.

"Michel: Me?

"Officer: You and her. . . . Tell me the truth. Okay? Remember I told you before, you're not telling me the whole truth. I know you.

"Michel: I know, I know you do, Officer.

"Officer: I know you ain't [*sic*] telling me the whole truth. [¶] . . .

"Officer: . . . And what she's saying is a version that matches . . . cuz [*sic*] we're gonna [*sic*] bring them in too. And they're gonna [*sic*] say that you went and picked 'em [*sic*] up.

"Michel: Wait, bring who in?

"Officer: All three of your boys. [¶] . . .

"Michel: Bring them. Bring them.

"Officer: Miguel's on his way right now.

"Michel: I'm telling you—

"Officer: Why would your girl tell us a different story? [¶] . . .

"Officer: . . . Man, just tell me. If you don't tell me—cuz [*sic*] your girl can put you there. Okay? And she has no reason to lie. *So I'll—we'll book you for murder right now.*

"Michel: Nah, what you mean? I didn't pull no trigger.

"Officer: I didn't say you pulled the trigger, did I? Did I once say you pulled the trigger?

"Michel: Then why would you keep me for murder?

"Officer: Cuz [*sic*] you were there. You're not telling the truth. [¶] . . .

"Officer: . . . Were you there? Yes or no.

"Michel: Was she—[w]hy?—Was she told—Was she telling you if I was there?

"Officer: She said you were there. You were in the car with her. Were you there? Yes or no?

"Michel: I was with her all day yesterday.

"Officer: Okay, were you there? Don't—don't give me that . . . I want you to tell me what you did yesterday. I want you to tell me what happened when they picked you up. You and her [*sic*] drive around. You get a little beef with him. You went and picked up Brandon and-—

"Michel: Why you saying it was me [*sic*]? I wasn't driving.

"Officer: Okay, were you in the car? [¶] . . .

"Michel: I was in the car. But I didn't—

"Officer: Did you guys—[d]on't put—[d]on't put words in my mouth.

"Michel: I'm not. I'm not.

"Officer: [*Michel*], *I will walk out this door right now, and I'll—I will go downstairs, get the book, and I will book you for murder right now*.

"Michel: Nah, nah, nah, officer. Nah.

"Officer: Okay? I will book you for murder right now. All right. [¶] . . . [D]on't play words and I was there. Nah, I wasn't driving, so I didn't pick them up—[f]ool, you know what the hell I'm talking about. *If you want to play around, I will leave. I'll take her statement—*

"Michel: Nah, officer.

"Officer*: I'll take the other people's statement. And I'll book you for murder. So you gonna* [*sic*] *start telling me the truth, or do I have to just go by what she's saying? Cuz* [*sic*] *I believe her. . . .* [¶] . . .

"Officer 2: Here's the deal, man. *You didn't pull the trigger* [*inaudible*] *you cover up and you hide for this, like I said, you go down for murder. Cause you're, you're, you're hindering the investigation. You're hiding it. You're helping shield those guys. You can't—just tell us the truth.*

"Michel: Stop scaring me, man.

"Officer 2: Just tell us the truth.

"Officer: No one's scaring you.

"Officer 2: You have a—

"Michel: You tried to say you were gonna [*sic*] book me for murder.

"Officer 2: No, but that can't happen if you don't—we're telling you, that's what it is.

"Officer: You're not telling the truth. That's what gonna [*sic*] happen. I don't make the rules. I don't make the rules. [¶] . . .

"Officer: Let me ask you this. Am I saying these things? Is it me that's saying that you went and picked him up with your girl? That you guys drove over to the [P]ark? Is it me saying that? Nah, I'm just repeating what someone said to me. Okay? The person who said it is someone you love. Correct? [¶] . . . [¶] . . . You guys were on Reed Street—

"Michel: She told you we were on Reed Street?

Officer: Mm-hmm (affirmative). That's where you saw each other, and you guys were gonna [*sic*] squabble.

"Michel: All right." (Italics added.)

After this colloquy, Michel told police that he challenged Albert to fight because Albert had "banged" on Michel's sister a few days earlier. Michel told police that

because Robert had a gun, Michel called "John" to come to the Park, but John did not answer. Michel denied that he and Ana picked up Brandon and the others. He said that Eric C. drove Brandon, Miguel, and Javier to the Park.

After police told Michel, "[T]hat's not what [Ana] said" and "Your girl's saying something different," Michel admitted that he and Ana drove to Adrianna's house and to pick up Brandon, Miguel, and Javier. However, Michel insisted he only intended to fight Albert and did not tell Brandon and the others that Robert was armed. Michel told police that at the Park Brandon said he had a gun and chambered a round. However, the plan was for Michel to fight Albert, and Brandon, Miguel, and Javier were to fight only if other Eastside members ambushed Michel.

Initially, Michel admitted that Brandon said he intended to shoot before Robert and Albert could shoot first. However, later Michel claimed that Brandon said he would only shoot in self-defense. Michel denied driving Brandon to Adrianna's house after the shooting. Michel claimed that after the shooting, he spent the night at his sister's house in Colton.

B. *Additional Procedural Background*

Before the first trial, defense counsel sought to exclude Michel's statements to police because the People had not established a knowing, voluntary, and intelligent waiver of *Miranda* rights. After viewing the interrogation video, the court denied Michel's motion, stating: "The entire interrogation was non-confrontational. No promises or threats were ever made. . . . [¶] Again, based on the totality of the

circumstances, I believe the defendant's waiver of his *Miranda* rights were given voluntarily, knowingly, and intelligently."

Michel's second trial started about two months after the mistrial on count 1. In that interim, there were no relevant factual or legal changes on the *Miranda* issue. Accordingly, defense counsel made the same argument, and the court made the same ruling.

C. *No Ineffective Assistance of Counsel*

Michel contends that statements he made in his second interrogation were involuntary because they resulted from police threats to charge him with murder. Michel asserts this threat implied that if he told the truth, he would not be booked for murder. Michel argues that his trial attorney rendered ineffective assistance by failing to "make the meritorious argument" that his statements to police were "psychologically coerced."

"'[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law.'" (*People v. Wall* (2017) 3 Cal.5th 1048, 1066.) "In determining whether a confession is involuntary, we consider the totality of the circumstances to see if a defendant's choice to confess was not """"essentially free"""" because his will was overborne by the coercive practices of his interrogator." (*People v. Spencer* (2018) 5 Cal.5th 642, 672 (*Spencer*).) "The facts surrounding an admission or confession are undisputed to the extent the interview is tape-recorded, making the issue subject to our independent review." (*People v. Linton* (2013) 56 Cal.4th 1146, 1177.)

We begin by noting that Michel makes no claim of physical intimidation or deprivation and no assertion of coercive tactics other than the interrogation itself. (See *Spencer*, *supra*, 5 Cal.5th at p. 672.) Indeed, police gave him water and a blanket. Nor does Michel dispute that prior to the interview he received *Miranda* warnings and waived his rights. These missing elements distinguish Michel's case from many others where courts have found a confession to have been involuntary. (*Spencer*, at p. 673 [collecting cases].)

It is also significant that the officers did not engage in any obvious strong-arm tactics. Michel complains that at one point, Detective Fierreira raised his voice. However, we have watched that video and the detective does not yell or significantly raise his voice. The detective is stern, but voluntariness is not "'to be equated with the absolute absence of intimidation,' for under this test virtually no statement would be voluntary." (*United States v. Pelton* (4th Cir. 1987) 835 F.2d 1067, 1072.) Given that police had the challenge of extracting the truth from a young gang member who was often coy and evasive in answering questions, the detectives' demeanor was not improper or coercive.

We reject Michel's contention that the threat to book him for murder was an implied promise of leniency that rendered his statements involuntary. The detective's threat to charge Michel with murder was a true statement that emphasized the gravity of the situation. Before Michel's second interrogation, police had interviewed J.M., who stated that Michel and Ana picked up armed ALC members and that Ana was the

getaway car driver. Police had also interviewed Ana, who said that one of the men in her car was armed and she knew gunfire could erupt.

Police never told Michel that he would be charged with some crime other than murder if he confessed. Police did not promise Michel leniency in exchange for admissions. Detectives told Michel the facts as they understood them and the status of the investigation—i.e., that they had enough evidence to arrest him for murder, even without any confession. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 59.) "[T]here is nothing improper in police truthfully telling a defendant that he will be prosecuted to the full extent of the law if he chooses not to cooperate." (*United States v. Haak* (2d Cir. 2018) 884 F.3d 400, 412.) Based on J.M.'s and Ana's statements to police, the possibility that Michel would be charged with murder was realistic. "No constitutional principle forbids the suggestion by authorities that it is worse for a defendant to lie in light of overwhelming incriminating evidence." (*People v. Carrington* (2009) 47 Cal.4th 145, 174.) "Law enforcement does not violate due process by informing a suspect of the likely consequences of the suspected crimes or of pointing out the benefits that are likely to flow from cooperating with the investigation." (*People v. Orozco* (2019) 32 Cal.App.5th 802, 820.)

At one point during the interrogation, Michel said that the detective was scaring him by threatening to arrest him for murder. However, Michel was not excessively fearful or distressed. He did not become confused, break down, or lose his composure under the detective's questioning. Michel had the wherewithal to repeatedly give a version of events that minimized his own involvement in the killing. For example, in his

first interview, Michel told police, "I'm not gonna [*sic*] lie to you," and insisted he was home asleep when Albert was shot and that he had already "distanced himself" from ALC. Michel said, "I . . . wasn't there. I wasn't involved in . . . any of this." In the second interview, Michel insisted that the plan was for him to fist fight Albert and that Brandon, Miguel, and Javier were to intercede only if other Eastside members ambushed Michel. When the detective replied that Michel's story was absurd, Michel stuck to his narrative, insisting, "[M]y mentality and everything is just different, you know." Michel's statements denying responsibility indicate that his will was not overborne. (*People v. Williams* (2010) 49 Cal.4th 405, 444 [crediting the fact that "defendant continued to deny responsibility in the face of the officers' assertions" as evidence that the defendant's will was not overborne]; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 58 ["His resistance, far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information."].)

Disagreeing with this analysis, Michel relies on *People v. Perez* (2016) 243 Cal.App.4th 863 (*Perez*), *People v. Vasila* (1995) 38 Cal.App.4th 865 (*Vasila*), *In re J. Clyde K.* (1987) 192 Cal.App.3d 710 (*Clyde K.*), and *In re Shawn D.* (1993) 20 Cal.App.4th 200 (*Shawn D.*). However, each of these cases is materially distinguishable.

In *Perez*, during a custodial interrogation police told the defendant that if he "'[told] the truth'" and was "'honest,'" then "'we are not gonna [*sic*] charge you with anything.'" (*Perez, supra*, 243 Cal.App.4th at p. 866.) Police also told the defendant that if he was honest and told the truth, "'[Y]ou'll have your life, maybe you'll go into the

Marines . . . and you'll chalk this up to a very scary time in your life.'" (*Id*. at p. 867.) This court concluded that the defendant's subsequent confession was "clearly motivated by a promise of leniency, rendering the statements involuntary . . . ." (*Ibid*.) *Perez* is inapt here because police did not promise Michel that he would not be charged with murder or any other crime in exchange for telling the truth.

Vasila, *supra*, 38 Cal.App.4th 865 is also off point. The primary issue there was whether a promise of leniency constitutes coercion when police fulfill the promise. In *Vasila*, investigators told the defendant that if he disclosed where illegal firearms were hidden, he would not be federally prosecuted and would be released on his own recognizance. (*Id*. at p. 875.) The *Vasila* court found that the defendant's decision to lead investigators to the firearms was motivated by these promises and was, therefore, involuntary. (*Id.* at pp. 875-877.) *Vasila* is factually inapposite because here the detectives did not make any promises to not prosecute Michel.

Michel's reliance on *Clyde K.*, *supra*, 192 Cal.App.3d 710 is similarly misplaced.[6] There, a police officer detained three juveniles who were carrying large boxes in a high theft area. The officer told each juvenile: "'If you tell me a lie, and I find out that the boxes are stolen, you will go to jail, but if you tell me the truth you will get a citation.'" (*Id.* at p. 720.) One of the juveniles confessed and that confession was introduced into evidence against the other two. The appellate court found the officer's approach was coercive because his "statement impermissibly led the young boys to expect more lenient

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6 *Clyde K.* was disapproved on other grounds in *People v. Badgett* (1995) 10 Cal.4th 330, 350.

treatment in exchange for their confessions. The potential benefits that the boys could expect (lesser punishment and immediate release with only a citation) were clearly and expressly spelled out by [the interrogating officer] himself." (*Id.* at p. 722.) Michel's case is materially different because police offered no quid pro quo (expressly or implicitly) to Michel, but instead simply encouraged him to tell the truth. As the court in *Clyde K.* observed, "[A]n officer may comment upon the realities of the situation without rendering a subsequent confession involuntary." (*Id.* at p. 722, fn. 4.)

Michel also analogizes his case to *Shawn D., supra,* 20 Cal.App.4th 200. There, police told the minor that if he talked he would not go to jail but could see his pregnant girlfriend. The officer also expressed that if the minor "explained" himself, the officer would speak to the district attorney and implied that he would make sure the minor was tried as a juvenile rather than as an adult. (*Id*. at pp. 215-216.) *Shawn D.* is readily distinguishable. Although the detectives exhorted Michel to be honest, they did not say that his cooperation would be recorded in a police report or that they would communicate with the district attorney. Whereas the promise of leniency in exchange for a confession permeated the entire interrogation in *Shawn D.*, the circumstances here are vastly different.

To establish ineffective assistance of counsel, Michel must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial. (*People v. Brown* (2014) 59 Cal.4th 86, 109.) Michel's ineffective assistance of counsel claim fails because statements he made during his second police interrogation were not involuntary

and, therefore, defense counsel did not provide ineffective assistance by failing to seek to exclude such statements on that ground. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90 [failure to make a meritless objection is not ineffective assistance].)

III. *NO INSTRUCTIONAL ERROR*

A. *Additional Background*

The evidence was undisputed that Brandon shot Albert. The prosecution's murder theories were that Michel had conspired to commit the murder, aided and abetted the murder, or committed a lesser crime (challenging a person to fight in public), for which second degree murder is a natural and probable consequence.

In Michel's first trial, the court instructed on heat of passion voluntary manslaughter as a lesser included offense of murder based on disputed evidence that Michel was fearful and afraid. The court also did so in the second trial.

The court instructed the jury with CALCRIM No. 520 defining malice aforethought murder. The court also gave CALCRIM No. 521, instructing the jury that first degree murder requires a determination that the defendant "acted willfully, deliberately, and with premeditation either as an aider and abettor or a co-conspirator." This instruction also stated that "second degree murder based on express or implied malice and/or the natural and probable consequence theories under both aiding and abetting and conspiracy are explained in CALCRIM No. 520 . . . and CALCRIM [Nos.] 403 and 417."

The court also instructed with CALCRIM No. 400, explaining that a person may be guilty of a crime as a perpetrator or instead as an aider and abettor. This was followed by CALCRIM No. 401 on direct aiding and abetting.

Next, the court instructed with CALCRIM No. 403 on second degree murder[7] under the natural and probable consequences theory:

> "Before you may decide whether the defendant is guilty of second degree murder, you must decide whether he is guilty of challenging a person to fight in public in violation of Penal Code [section] 415[, subdivision] (1).
>
> "To prove that the defendant is guilty of second degree murder, the People must prove that:
>
> "1. The defendant is guilty of challenging a person to fight in public;
>
> "2. During the commission of challenging a person to fight in public a coparticipant in that challenging a person to fight in public committed the crime of second degree murder;
>
> "AND
>
> "3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the second degree murder was a natural and probable consequence of the commission of the challenging a person to fight in public.
>
> "A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.
>
> "A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

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7 In *People v. Chiu* (2014) 59 Cal.4th 155, 158-159 (*Chiu*), the California Supreme Court held that "an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (Italics omitted.)

> In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.
>
> "To decide whether the crime of challenging a person to fight in public was committed, the People must prove that: 1. The defendant willfully challenges someone else to fight; AND 2. The defendant and the other person were in a public place when the challenge was made. Someone commits an act willfully when he does it willingly or on purpose." (Original italics.)

The court also gave CALCRIM No. 417 on conspiracy and the natural and probable consequences doctrine, which was consistent with CALCRIM No. 403 by stating that the jury could convict Michel of second degree murder if, among other required elements, second degree murder was a natural and probable consequence of the crime that he conspired to commit.

The court also instructed with CALCRIM No. 570 on voluntary manslaughter under a heat-of-passion theory.

During deliberations, the jury was unable to reach a verdict on first degree murder and asked for additional closing arguments. The court asked the jury to specify what it wanted each attorney to address. The jury stated that the prosecutor should address "[w]hat specific evidence shows [Michel's] decision to participate in the premeditation to commit murder" because "[a]ll of the testimony we have heard indicates [Michel] only wanted to fight. What actions indicate he was making a decision to kill?"

After additional closing arguments, the jury remained deadlocked on first degree murder. At the People's request, the court dismissed the first degree murder charge under section 1385. About 10 minutes later, the jury found Michel guilty of second degree murder.

Michel contends that the court erred in instructing on the natural and probable consequences doctrine. Primarily relying on *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*), Michel asserts: "The instructions did not allow the jury to return a verdict of voluntary manslaughter based on a sudden quarrel/heat of passion under the doctrine, even though the killer was guilty of murder, on the basis that voluntary manslaughter, not second degree murder, was the only reasonably foreseeable crime to a person in [Michel's] position." Michel contends that once the court dismissed the first degree murder charge, the effect of the claimed instructional error was to improperly leave the jury with an all-or-nothing choice of convicting him of second degree murder or acquittal.

B. *Analysis*

"""'A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime.'""" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1228-1229.) In assessing whether the nontarget offense was a natural and probable consequence of the intended crime, the inquiry is objective and "only requires . . . that the nontarget offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Chiu*, *supra*, 59 Cal.4th at p. 165.)

In *Woods*, *supra*, 8 Cal.App.4th 1570, the defendants, Woods and Windham, went to an apartment and assaulted women living there to retaliate for a shooting of the defendants' friend by the women's acquaintance. After the defendants left the apartment,

while they were loading stolen items into their car, Woods shot and killed an occupant of another car a few parking stalls away, apparently out of fear that the victim could identify him and Windham. Both Woods and Windham were convicted of first degree murder. (*Woods, supra,* 8 Cal.App.4th at p. 1577.) The court in *Woods* held that "an aider and abettor may be found guilty of a lesser crime than that ultimately committed by the perpetrator where the evidence suggests the ultimate crime was not a reasonably foreseeable consequence of the criminal act originally aided and abetted, but a lesser crime committed by the perpetrator during the accomplishment of the ultimate crime was such a consequence." (*Id.* at p. 1577.)

The *Woods* court concluded the trial court should have instructed the jury they could convict Windham of second degree murder as an aider and abettor even though they found Woods guilty of first degree murder. Significantly, however, the court found the trial court was not required to instruct on included offenses *less* than second degree murder, such as voluntary and involuntary manslaughter. (*Woods, supra,* 8 Cal.App.4th at p. 1578.) The court reasoned that an aider and abettor is only entitled to instructions on lesser included offenses "where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence." (*Woods,* at p. 1588.) The determination whether a particular lesser offense was foreseeable "is not founded on the aider and abettor's subjective view of what might occur" but on "an 'objective analysis of causation'; i.e., whether a reasonable person under like circumstances would recognize that the crime was a reasonably foreseeable consequence of the act aided and abetted." (*Id.* at p. 1587.)

Applying this reasoning to the evidence, the court in *Woods* concluded that only instructions on second degree murder were required. The jury could have determined it was not reasonably foreseeable Woods would commit premeditated murder of an innocent bystander, but it was foreseeable he might kill intentionally without premeditation, or as a result of an intentional dangerous act without due caution. (*Woods, supra,* 8 Cal.App.4th at p. 1590.) However, "no evidence suggested that second degree murder ensuing from the armed onslaught was unforeseeable . . . ." (*Id.* at p. 1593.) Therefore, no instructions on voluntary or involuntary manslaughter were required. (*Ibid.*)

Contrary to Michel's contention, *Woods*, *supra*, 8 Cal.App.4th 1570 does not support reversal here. Under *Woods*, to hold that involuntary manslaughter instructions on a heat of passion theory were required, we would have to conclude that the jury could reasonably find not only that voluntary manslaughter was foreseeable but that second degree murder was not. (*Id.* at p. 1588 ["Therefore, in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence."].) We cannot reach that conclusion on this record. Michel admitted that he knew Brandon was armed with a semi-automatic .45-caliber handgun—he heard him chamber a round at the Park. Michel told police that he knew Brandon intended to shoot Albert because Adrianna had "been

wanting" Albert killed in retaliation for Albert's role in Julio's killing.[8] Ana also told police that she knew gunfire could erupt. The gang expert testified that given the heated rivalry between ALC and Eastside, it was reasonably foreseeable that a fist fight could escalate to a shooting. The overwhelming evidence was that Albert's murder was the anticipated culmination of the escalating gang confrontations between ALC and Eastside. Thus, this is not a case "where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was . . . ." (*Woods*, *supra*, 8 Cal.App.4th at p. 1588.) Accordingly, Michel's argument under *Woods* fails.

Disagreeing with this analysis, Michel asserts that the jury "had substantial doubt" that he wanted anything more than to fight Albert. However, even if we accept Michel's statements that he only intended a fist fight, they do not undermine the conclusion that a reasonable person would have known that murder was a reasonably foreseeable consequence of the intended crime. A shooting death is often a reasonably foreseeable consequence of a gang confrontation. (See *People v. Medina* (2009) 46 Cal.4th 913, 925-926.) ALC was in a violent rivalry against Eastside, leading to escalating retaliations for prior assaults and killings. The Park was disputed gang territory—both ALC and Eastside were trying to claim the Park as their own. ALC members were instructed by their leader, Adrianna, to kill Albert.

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8 Later in the same interrogation, Michel claimed that although he heard Brandon chamber a round, he did not know the shooting would happen.

Accordingly, even assuming that Michel intended only a fist fight, the court had no obligation to instruct on voluntary manslaughter on a natural and probable consequences theory. (*Woods*, *supra*, 8 Cal.App.4th at p. 1593 ["the trial court need not instruct on a particular necessarily included offense . . . if the evidence establishes that a greater offense [i.e., second degree murder] was a reasonably foreseeable consequence of the criminal act originally contemplated [challenging to fight in public], and no evidence suggests otherwise"].)

Moreover, even if the trial court should have instructed on voluntary manslaughter on a natural and probable consequences theory, we would find such error harmless beyond a reasonable doubt. Instructing on voluntary manslaughter, the court informed the jury that "[a] killing that would otherwise be murder is reduced to voluntary manslaughter" if "1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."

In the first trial, after two and a half days of deliberations, the jury deadlocked on count 1, with three voting for first degree murder and nine for second degree. The trial court noted there was "no indication of any desire to find [Michel] either not guilty or [guilty of the] lesser included offense of voluntary manslaughter."

In the second trial, after five days of deliberations, eight jurors voted for first degree murder and four for second degree. With no juror voting for voluntary

manslaughter, the court remarked, "[I]t does appear there is difficulty in regards to the jurors making a decision between first and potentially second-degree."

Thus, after two trials, zero out of 24 jurors voted for voluntary manslaughter. This is undoubtedly because the overwhelming evidence showed that Michel (1) challenged Albert to fight, (2) recruited an armed gang member, and (3) returned with the gunman and his cohorts to shoot Albert, who Adrianna had ordered to be killed.

Although the trial court instructed on voluntary manslaughter on a heat of passion theory, it did so only in an abundance of caution, stating, "[I]t's a stretch." It was more than a stretch. Albert had no gun, was running for his life, got shot in the buttocks as he fled, and, while Albert begged for his life, gang members who Michel brought to the Park kicked Albert's face as he bled to death.

IV. *RESENTENCING*

The court imposed a 25-year-to-life firearm enhancement under section 12022.53, subdivisions (d) and (e). When sentencing Michel in 2017, the court could not strike this enhancement. (§ 12022.53, former subd. (h), added by Stats. 2010, ch. 711, § 5, repealed by Stats. 2017, ch. 682, § 2, eff. Jan 1, 2018.) However, effective January 1, 2018, section 12022.53, subdivision (h) provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Michel's case was not yet final when this amendment to section 12022.53 became effective. Accordingly, because section 12022.53, subdivision (h) now gives the trial

court authority to lower Michel's sentence, the Attorney General concedes, and we agree, that the matter should be remanded to the trial court to exercise its discretion in determining whether to strike the firearm enhancement. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.)

V. *CORRECTIONS TO THE ABSTRACTS OF JUDGMENT*

Michel contends, and the Attorney General agrees, that the abstracts of judgment contain the following errors that should be corrected:

(1) The abstract of judgment for the indeterminate term states that the 25-year-to-life enhancement in count 1 was imposed under section 12022.53, subdivision ("D"). However, that enhancement should be shown as being imposed under section 12022.53, subdivisions (d) and (e) because Michel was charged under the vicarious provisions of subdivision (e).[9]

(2) The abstract of judgment for the indeterminate term contains check marks on both box 6(a) and box 6(b). Michel contends, and the Attorney General agrees, that only box 6(a) should be checked, reflecting the 15-year-to-life sentence imposed on count 1.

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9 Section 12022.53 provides in part: "(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life. [¶] (e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

It is incorrect to also check box 6(b) for the 25-year-to-life enhancement because the last line of box 6 states, "PLUS enhancement time shown above."

(3) The abstract of judgment for the determinate term (count 2) also contains errors. Michel contends, and the Attorney General agrees, that the enhancements identified in item 2 were attached to count 1, not count 2 and, therefore, should not be listed on the abstract of judgment for the determinate term, but instead should be listed on the abstract of judgment for the indeterminate term.. The stayed enhancements listed in item 2 of the abstract of judgment for the determinate term should be listed as stayed enhancements in item 2 of the abstract of judgment for the indeterminate term.

(4) The court ordered that Michel will be "jointly and severally responsible" with codefendants for $7,500 to the California Victim Compensation Board and $34,139.55 to J.P. The abstract of judgment does not reflect that restitution was ordered as a joint and several obligation. Michel contends, and the Attorney General agrees, that the abstract of judgment should be corrected to reflect that the victim restitution order is the joint and several obligation of Michel and his codefendants if they are ordered to pay victim restitution for Albert's death. Box 12 on the abstract of judgment for the indeterminate term should be corrected to reflect that the $7,500 for victim compensation board and the $34,139.55 to J.P. is the joint and several obligation of Michel and any codefendant of his who is ordered to pay such restitution.

DISPOSITION

The matter is remanded for resentencing to allow the trial court to exercise its discretion in determining whether or not to impose the 25-year-to-life enhancement under

section 12022.53, subdivisions (d), (e), and (h). We express no opinion on how the trial court should exercise such discretion. The trial court is directed to correct the abstracts of judgment as provided in part V of this opinion, and to then forward the corrected abstracts of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.